STATE OF MICHIGAN

COURT OF APPEALS

PLANTE & MORAN, PLLC, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 17, 2015
v	No. 323562 Oakland Circuit Court
RONALD BERRIS, DDS, and RONALD D. BERRIS, DDS, PC, Defendants/Counter-Plaintiffs-Appellants.	LC No. 2013-137207-CZ

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

PER CURIAM.

Defendants/counter-plaintiffs Ronald Berris, DDS, and Ronald D. Berris, DDS, PC ("defendants") appeal as of right the order of judgment in favor of plaintiff/counter-defendant Plante & Moran, PLLC ("plaintiff"). We affirm.

This case arises out of an agreement between Berris and his associate Dr. Allen Platt to enter arbitration, with the arbitration services being performed by plaintiff. For a relevant summary of facts regarding the arbitration, we turn to our prior decision in *Platt v Berris*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2013 (Docket Nos. 297292, 298872), p 1:

> In May 1996, [Dr. Berris and Dr. Platt] agreed to practice together. Berris sold Platt half the practice's stock. Platt and the practice contractually agreed that the parties would settle any disputes by arbitration "in accordance with the rules . . . of the American Arbitration Association[.]" The contract also provided that the practice would compensate Platt with a percentage of its revenue.
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> On March 1, 1999, Platt filed a civil suit in the circuit court that sought to dissolve the corporation and alleged that Berris refused to abide by the parties' contract.

Pursuant to the agreement, Berris and Platt were ordered to attend arbitration. They hired plaintiff to perform the arbitration, with the parties signing an engagement letter that acted as the arbitration contract. On December 4, 2008, the arbitrator working for plaintiff determined that

Berris was personally liable to Platt for $110,000. *Platt*, unpub op at 2. Berris moved to set aside that award in the trial court, while Platt sought confirmation. *Id*. Berris raised a myriad of issues regarding plaintiff's performance as an arbitrator that fell into two categories: (1) plaintiff had exceeded its scope of power discussed in the arbitration contract, and (2) plaintiff had engaged in various factual and calculation errors. The trial court determined that plaintiff did not act improperly, or in other words, that plaintiff had not breached the contract, and that the court could not review factual and calculation errors in the arbitrator's decision.

Berris then appealed to this Court. This Court explained that an arbitrator's power arises from the arbitration contract and that an arbitration award can be overturned where the arbitrator has breached the contract. *Platt*, unpub op at 3. This Court then considered the terms of the contract and determined that plaintiff's performance had not fallen outside the requirements of that contract. *Id*. at 3-5. With regard to the factual and calculation issues raised by Berris, this Court determined that such decisions were not reviewable. *Id*. at 5-6. In so deciding, this Court affirmed the trial court's decision to confirm the arbitration award. *Id*. Defendants did not seek leave to appeal the decision to the Michigan Supreme Court.

Despite the finality of the aforementioned case, defendants still refused to pay a portion of the fee owed to plaintiff. Plaintiff brought the present suit seeking those fees, alleging in the complaint that (1) defendants improperly refused to pay plaintiff the amount due under a statement of account, (2) defendants would be unjustly enriched if they failed to pay plaintiff the amount due, and (3) defendants breached the arbitration agreement with plaintiff. Defendants filed a counterclaim, arguing that plaintiff had negligently performed as an arbitrator and had breached the arbitration contract. Plaintiff moved for summary disposition under MCR 2.116(C)(8), (9), and (10), arguing that defendants failed to provide a defense to plaintiff's claim for account stated and that defendants' counterclaims were barred by res judicata. Defendants argued in their response that res judicata was inapplicable because plaintiff was not a party to the first suit and that the issues were not fully litigated and decided. The trial court found for plaintiff, stating that summary disposition in favor of plaintiff was warranted because defendants had not presented a valid defense to plaintiff's account stated claim and that summary disposition of the counterclaims in favor of plaintiff was warranted because res judicata barred defendants' counterclaims. The trial court then entered judgment in favor of plaintiff.

Defendants argue that the trial court erred in granting summary disposition in favor of plaintiff since the doctrine of res judicata did not apply to bar defendant's claims and defenses. We agree that the doctrine of res judicata did not apply in this case, but conclude that the trial court properly granted summary disposition in favor of plaintiff since defendants failed to raise a valid defense to plaintiff's claims, defendants are collaterally estopped from arguing that plaintiff breached the arbitration agreement, and defendants' negligence claim is barred by arbitral immunity.

In its order granting summary disposition in favor of plaintiff, the trial court cited MCR 2.116(C)(8), (C)(9), and (C)(10). However, the record reveals that the trial court determined that the doctrine of res judicata applied to defendants' counter-complaint. Because summary disposition pursuant to res judicata is more aptly decided under MCR 2.116(C)(7), we review the trial court's decision regarding defendants' counter-complaint under that subrule. MCR 2.116(C)(7); *Spiek v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998) ("Where

summary disposition is granted under the wrong rule, Michigan appellate courts, according to longstanding practice, will review the order under the correct rule."). We review de novo a trial court's decision on a motion for summary disposition. *McLain v Lansing Fire Dep't*, 309 Mich App 335, 340; 869 NW2d 645 (2015). "When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *Id*. A trial court's determination regarding the application of the doctrine of res judicata is also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Further, " '[u]nder MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are barred because of immunity granted by law[.]' " *Latits v Phillips*, 298 Mich App 109, 113; 826 NW2d 190 (2012) (citation omitted; alteration in *Latits*). Finally, summary disposition is proper under MCR 2.116(C)(9) " 'when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery.' " *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 589; 848 NW2d 425 (2014) (citation omitted).

We first note that defendants do not challenge the trial court's decision that no valid defense was raised regarding plaintiff's account stated claim. Where a party fails "to dispute the basis of the trial court's ruling," this Court " 'need not even consider granting [them] the relief they seek.' " *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (citation omitted). Furthermore, defendants failed to state a valid defense to the account stated claim in its answer, and instead, merely argued that the amount was not properly due. As discussed in further detail below, the amount was properly due to plaintiff. Therefore, the trial court properly granted summary disposition with regard to the account stated claim since, as noted by the trial court, defendants failed to raise a valid defense. See MCR 2.116(C)(9); *Wells Fargo Bank*, 304 Mich App at 589.

In addition, although the doctrine of res judicata did not apply in this case, the doctrine of collateral estoppel barred defendants' breach of contract claim. For res judicata to bar a subsequent suit, the following must be established: "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Plaintiff was not a party to the prior suit. In addition, plaintiff was not in privity with Dr. Platt. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id*. (citations omitted). The present suit is, at least in part, an attempt to collect a fee owed to plaintiff. The issue in the first suit was whether the arbitration award itself must be set aside. Dr. Platt has no right to collect the fee, nor did Dr. Platt have any interest in whether plaintiff indeed collected the fee from defendants. Therefore, it cannot be said that the parties represented "the same legal right." See *id*. Without privity, the third element for applying the doctrine of res judicata is not met. See *Dart*, 460 Mich at 586. As such, res judicata was inapplicable. See *id*. Nevertheless, summary disposition regarding defendants' breach of contract arguments was still warranted on the alternative ground of collateral estoppel.

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes*, 481 Mich at 585. "By preventing relitigation, this doctrine attempts to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 520; 847 NW2d 657 (2014) (citations and quotation marks omitted). "[M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Monat v State Farm Ins Co*, 469 Mich 679, 684; 677 NW2d 843 (2004) (alteration in *Monat*). However, "where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Id*. at 695.

Defendants insist that they have not been provided the opportunity to litigate these claims because of the high standards required to be followed for review of an arbitration award. We disagree. In the previous suit, this Court noted that, pursuant to MCR 3.602(J)(2), plaintiff's award could only be set aside for two reasons posited by Berris: " 'the arbitrator exceeded his or her powers,' " or, alternatively, " 'the arbitrator refused to . . . hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.' " *Platt*, unpub op at 3, quoting MCR 3.602(J)(2). This Court also held that plaintiff could have only exceeded its powers if it "act[ed] beyond the material terms of the arbitration contract, or . . . the decision contravenes controlling principles of law in a way that materially prejudices the rights of the parties." *Platt*, unpub op at 3. In so deciding, this Court stated that it was required to turn to the engagement letter, or arbitration contract, that was entered into between plaintiff and defendants. *Id*. Subsequently, this Court, and the trial court before it, considered defendants' arguments that plaintiff had breached the contract, and found them all to be without merit. *Id*. at 3-5. While defendants are correct that review of an arbitrator's decision is severely limited, a reviewing court is specifically permitted to determine whether the arbitrator acted outside the bounds of the arbitration agreement. See MCR 3.602(J)(2)(c). This is precisely what the trial court and this Court did when it reviewed defendants' motion to set aside the arbitration award. As such, defendants were presented with "a full and fair opportunity to litigate," and actually did litigate, an issue "essential to the judgment," and a final judgment was entered finding their claims to be without merit. See *Estes*, 481 Mich at 585. Further, because the doctrine is being used defensively by plaintiff, mutuality of estoppel is not required. See *Monat*, 469 Mich at 695. Determining otherwise would permit defendants to once again litigate the issue of whether plaintiff breached the arbitration agreement. Collateral estoppel was created to disallow such a situation. See *Wells Fargo Bank*, 304 Mich App at 520. Therefore, defendants' defense and counterclaim regarding breach of contract was properly summarily disposed of, even if for the wrong reason. See *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 288 n 32; 856 NW2d 206 (2014) (" 'A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.' ") (citation omitted).

Next, defendants' claim of negligence against plaintiff was also properly dismissed, albeit for the wrong reason. See *Janet Travis, Inc*, 306 Mich App at 288 n 32. On appeal,

plaintiff raises the issue of arbitral immunity. Defendants insist that the argument by plaintiff, never having been presented before the trial court, is unpreserved, and this Court should refuse to consider it. It is true that this Court does not typically review an argument unless it has been properly preserved. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). "Generally, to preserve an issue for appellate review, the issue must be raised before and decided by the trial court." *Id*. It is undisputed that plaintiff did not argue arbitral immunity before the trial court. As such, this issue is unpreserved. See *id*. However, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We choose to do so here, because this is an issue of law for which all relevant facts are part of the record. See *id*.

"An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity." MCL 691.1694(1). "[A]rbitrators . . . are not liable for negligent performance." *Boraks v American Arbitration Ass'n*, 205 Mich App 149, 153; 517 NW2d 771 (1994). We agree with our prior decision in *Boraks* and determine that plaintiff was protected by arbitral immunity for defendants' claim of negligence. See *id*. As such, summary disposition for that claim was also warranted under immunity granted by law pursuant MCR 2.116(C)(7). Plaintiff's request for attorney's fees pursuant to MCR 691.1694(5) is denied, however, because the statute requires defendants to have "commenced" the suit, and that is not the case here since plaintiff commenced the lawsuit. In sum, the trial court properly granted summary disposition in favor of plaintiff.

Affirmed. As the prevailing party, plaintiff may tax costs. See MCR 7.219(A).

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Michael J. Riordan